**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
*Office of Administrative Appeals* MS 2090
Washington, DC 20529-2090

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**U.S. Citizenship and Immigration Services**

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 26 2009

EAC 05 004 52453

IN RE: [redacted]

PETITION: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The AAO affirmed its dismissal of the appeal in response to a motion to reopen and reconsider. The matter is again before the AAO on a second motion to reopen and reconsider. The AAO will again affirm its dismissal of the appeal.

The petitioner seeks immigrant classification under section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien battered or subjected to extreme cruelty by a United States citizen.

The instant Form I-360 was filed on October 4, 2004. Via an April 5, 2005 request for additional evidence and a March 10, 2006 notice of intent to deny the petition, the petitioner was twice afforded the opportunity to submit additional evidence into the record of proceeding. On July 19, 2006, the director denied the petition, on the basis of his determination that the petitioner had failed to establish that she married her husband in good faith.

Counsel filed a timely appeal on August 21, 2006, and submitted additional evidence into the record on January 16, 2007. The AAO dismissed counsel's appeal on February 12, 2007. In its decision, the AAO agreed with the director's determination that the petitioner had failed to establish that she married her husband in good faith. The AAO also found, beyond the decision of the director, that the petitioner had also failed to demonstrate that she had shared a joint residence with her husband.

Counsel filed a motion to reopen and reconsider on March 14, 2007. In support of his motion, counsel submitted a fifth affidavit from the petitioner; a copy of a June 16, 2003 letter addressed to the petitioner and her husband from the legacy Immigration and Naturalization Service; and a photograph of the couple. On December 5, 2008, the AAO affirmed its February 12, 2007 decision dismissing the appeal. Citing to 8 C.F.R. § 103.5(a)(2), the AAO found that, based upon the plain meaning of the word "new," no new facts or evidence had been submitted. As such, counsel had failed to satisfy the requirements of a motion to reopen. Citing to 8 C.F.R. § 103.5(a)(3), the AAO found that counsel had failed to submit any precedent decisions to establish that the AAO's February 12, 2007 dismissal had been based on an incorrect application of law or USCIS policy based on the evidence at the time of that decision. As counsel's submission had satisfied the requirements of neither a motion to reopen nor a motion to reconsider, the AAO reaffirmed its decision to dismiss the appeal.

Counsel timely filed the instant submission, which is again titled a motion to reopen and a motion to reconsider, on January 7, 2009. In support of his motion, counsel submits two affidavits. Counsel asserts that these two affidavits were previously unavailable to the petitioner. Counsel also asserts that the AAO's December 5, 2008 was erroneous as a matter of law, was an abuse of discretion, and that it was contrary to USCIS policy.

With regard to his assertion that the AAO's December 5, 2008 decision was erroneous as a matter of law, counsel states that, pursuant to section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J), USCIS must consider any credible evidence in adjudicating this type of petition. According to counsel,

the AAO "improperly impose[d] an additional evidentiary burden on the Petitioner." With regard to his assertion that the AAO abused its discretion in its December 5, 2008 decision, counsel states that the evidence of record establishes that the petitioner shared a joint residence with her husband, and that she married him in good faith. With regard to his assertion that the AAO's December 5, 2008 decision was contrary to USCIS policy, counsel cites two unpublished AAO decisions.

Upon review of the entire record of proceeding, the AAO finds counsel's assertions unpersuasive, and will affirm its February 12, 2007 and December 5, 2008 decisions.

The AAO disagrees with counsel's assertion that it "improperly impose[d] an additional evidentiary burden on the Petitioner" in its December 5, 2008 decision. Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J), which was cited by counsel, states, in pertinent part, the following:

> In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) . . ., or in making determinations under subparagraphs (C) and (D), the [Secretary of Homeland Security] shall consider any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the [Secretary of Homeland Security].

However, counsel is reminded that the AAO's December 5, 2008 decision involved the adjudication of a motion. As such, the petitioner must also comply with the rules pertaining to motions. As was noted by the AAO in its December 5, 2008 decision, the requirements of a motion to reopen are set forth at 8 C.F.R. § 103.5(a)(2):

> *Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The petitioner is not excused from satisfying the regulation at 8 C.F.R. § 103.5(a)(2), as counsel appears to imply. The petitioner was afforded three opportunities in which to supplement the record prior to counsel's motions: (1) via the director's request for additional evidence; (2) via the director's NOID; and (3) on appeal. Pursuant to the statute and regulation, the determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of USCIS. *See* Section 204(a)(1)(J) of the Act, 8 U.S.C. §1154(a)(1)(J); 8 C.F.R. § 204.2(2)(i). However, once counsel began filing motions, he was required to also satisfy the regulations pertaining to motions.

Again, in order to qualify as a motion to reopen, the motion must state the new facts to be provided in the reopened proceeding. As the AAO noted in its December 5, 2008 decision, based upon the plain meaning of the word "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding. The testimony in the affidavits presented in counsel's motions provides further details regarding the couple's relationship. However, no explanation is offered, beyond counsel's assertion on the Form I-290B that "[t]his evidence was

previously unavailable,"[1] to explain why this testimony is forthcoming only at this time. Again, the petitioner has been provided with numerous opportunities to provide evidence of her alleged good faith entry into the marriage and of her alleged joint residence with her husband. The affidavits submitted on motion after the director and the AAO has pointed out the deficiencies and inconsistencies in the previous testimony of record are not new.

As the AAO observed in its December 5, 2008 decision, motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. None of the information submitted by counsel in either of his motions is new evidence.

For all of these reasons, counsel's motion fails to satisfy the requirements of a motion to reopen.

Nor does counsel's motion satisfy the requirements of a motion to reconsider. As was noted by the AAO in its December 5, 2008 decision, the requirements of a motion to reconsider are set forth at 8 C.F.R. § 103.5(a)(3):

> *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Counsel's motion fails to rise to the standard set forth at 8 C.F.R. § 103.5(a)(3) for two reasons. First, counsel's motion is not supported by pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. Although counsel cites two unpublished AAO decisions in his submission, neither of those cases are precedent decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. As such, counsel's motion fails to satisfy the first requirement of a motion to reconsider set forth at 8 C.F.R. § 103.5(a)(3).

Nor does counsel's motion qualify as a motion to reconsider under the second requirement of a motion to reconsider set forth at 8 C.F.R. § 103.5(a)(3), as he fails to establish that the decision he seeks to reopen was incorrect based upon the evidence of record at the time of the initial decision. Rather, counsel is asserting that, as a result of the "new" information he is submitting into the record,

[1] The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

the petitioner qualifies for the benefit sought. As such, counsel's motion fails to satisfy the second requirement of a motion to reconsider set forth at 8 C.F.R. § 103.5(a)(3).

As counsel's motion fails to satisfy either requirement of 8 C.F.R. § 103.5(a)(3), it fails to qualify as a motion to reconsider.

Counsel's motion, therefore, fails to meet the requirements of either a motion to reopen or reconsider. The regulation at 8 C.F.R. § 103.5(a)(4) states, in pertinent part, the following:

> *Processing motions in proceedings before the Service.* A motion that does not meet applicable requirements shall be dismissed. . . .

As counsel's motion satisfies the requirements of neither a motion to reopen nor a motion to reconsider, it must be dismissed in accordance with 8 C.F.R. § 103.5(a)(4). Accordingly, counsel's motion will be denied, the proceedings will not be reopened, and the previous decisions of the AAO will be affirmed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The AAO's decisions of July 19, 2006 and December 5, 2008 are affirmed. The petition is denied.